

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	) ) MDL NO. 1456 ) Civil Action No. 01-12257-PBS ) Subcategory No. 03-10643
THIS DOCUMENT RELATES TO:	)
<i>The City of New York, et al.</i>	)
v.	)
<i>Abbott Laboratories, Inc., et al.</i>	)

**OCTOBER 2009 STATUS REPORT ON BEHALF OF  
THE CITY OF NEW YORK AND NEW YORK COUNTIES**

The undersigned counsel for the City of New York and New York Counties in the above-captioned action (hereinafter referred to as “plaintiffs”) hereby submit the attached Status Report for October 2009, in accordance with the Court’s June 17, 2004 Procedural Order.

Dated: October 1, 2009

Respectfully submitted,

**City of New York and New York Counties in  
MDL 1456 except Nassau and Orange, by**

**KIRBY McINERNEY, LLP**  
825 Third Avenue  
New York, New York 10022  
(212) 371-6600

By: /s/ Joanne M. Cicala  
Joanne M. Cicala  
Kathryn B. Allen

Ross B. Brooks, Esq.  
MILBERG LLP  
One Pennsylvania Plaza  
New York, NY 10119  
(212) 594-5300  
*Special Counsel for the County of Nassau*

Theresa A. Vitello, Esq.  
LEVY PHILLIPS &  
KONIGSBERG, LLP  
800 Third Avenue  
New York, NY 10022  
(212) 605-6205  
*Counsel for the County of Orange*

**October 2009 Status Report on Behalf of the  
City of New York and New York Counties**

**FUL Summary Judgment Briefing**

**1. Supplemental Filings**

On July 8, 2009, the Court heard oral arguments on the parties' respective motions for partial summary judgment on FUL issues. At the hearing, the Court requested a filing from the Department of Justice ("DOJ") to supplement the Brief of the United States on the Federal Upper Limit, filed June 28, 2007 [Docket No. 4413]. The DOJ has advised that it intends to provide a supplemental brief in October 2009. In addition, plaintiffs will seek leave to file a supplement regarding the calculation of FUL damages.

**2. Defendants' Motion to Exclude Plaintiffs' Expert Testimony**

On July 23, 2009, the Court granted Defendants' Motion for Leave to File Reply Memorandum in Support of Joint Motion to Exclude the Proffered Expert Report and Testimony of Harris Devor, C.P.A. [Docket No. 6253, Sub-docket No. 137]. Defendants filed their reply that day [Docket No. 6281; Sub-docket No. 150]. Oral argument has yet to be scheduled.

**GSK Motion for Partial Summary Judgment**

On July 2, 2009, GSK filed its sur-reply in support of its Motion for Partial Summary Judgment. [Docket No. 6250; Sub-docket No. 135]. The parties have requested a date for additional oral argument on this motion. No date has yet been set.

**Discovery**

**1. Motion to Compel Discovery from Defendant Merck**

On September 4, 2009, plaintiffs filed their Motion to Compel Discovery from Defendant Merck for all drugs with spreads greater than 30%. *See* Docket. No. 6487; Sub-docket. No. 158.

Defendant Merck's response to plaintiffs' motion is due October 5, 2009.

## **2. Schering's Motion for a Protective Order**

Plaintiffs will file their motion to lift the Schering Protective Order and expert affidavit after the Court rules on GSK's Motion for Partial Summary Judgment [Docket No. 5706].

## **3. Hearing as to Outstanding Discovery Motions**

On September 14, 2009, Magistrate Judge Marianne B. Bowler heard oral arguments on plaintiffs' motion to Quash Defendant Schering-Plough Corporation's, Schering Corporation's and Warrick Pharmaceutical Corporation's Cross-Notice of Continued Videotaped Deposition of Lynn Donovan [Docket. No. 6262; Sub-Docket. No. 138]. The Court took the parties' arguments under advisement, and has not yet entered an order. *See* Electronic Clerk's Notes for proceedings held before Magistrate Judge Marianne B. Bowler, entered September 21, 2009.

## **Proposed Schering/Ven-a-Care Settlement**

On August 28, 2009, plaintiffs filed their Response and Objection to the Motion for Approval of Settlement Between California, Florida, and Relator Ven-A-Care of the Florida Keys on Behalf of Itself and the United States and Schering-Plough, Schering and Warrick. *See* Docket. No. 6435.

On September 11, 2009, plaintiffs filed their Sur-Response and Objection to the Motion for Approval of Settlement Between California, Florida, and Relator Ven-A-Care of the Florida Keys on Behalf of Itself and the United States and Schering-Plough, Schering and Warrick. *See* Docket No. 6502.

The Court scheduled oral arguments on the parties' filings for October 5, 2009. *See* September 21, 2009 Electronic Notice of Rescheduled Motion Hearing.

### **CERTIFICATE OF SERVICE**

I, Kathryn Allen, hereby certify that on the 1st day of October, 2009, I caused a true and correct copy of the above October 2009 Status Report for the City of New York and New York Counties to be delivered to counsel of record for defendants by electronic service pursuant to Case Management Order No. 2 entered by the Honorable Patti B. Saris in MDL No. 1456.

Dated: October 1, 2009

/s/ Kathryn B. Allen  
Kathryn B. Allen  
Kirby McInerney LLP  
825 Third Avenue  
New York, NY 10022  
(212) 371-6600